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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WILLIAM REEVES,

Defendant and Appellant.

E052778

(Super.Ct.No. SWF026643)

OPINION

APPEAL from the Superior Court of Riverside County. Robert Baysinger, Judge.
(Retired judge of the San Joaquin Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Modified and conditionally reversed with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis, and Quisteen
S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Michael William Reeves, appellant and defendant (hereafter defendant), appeals from the judgment entered after a jury found him guilty as charged of one count of possessing methamphetamine for sale in violation of Health and Safety Code section 11378 (count 1); one count of maintaining a place for unlawfully selling, giving away, and using methamphetamine in violation of Health and Safety Code section 11366 (count 2); and he admitted that he had previously been convicted of two prior serious or violent felonies within the meaning of the so-called three strikes law (Pen. Code, §§ 667, subds. (c), (e)(2)(A) & 1170.12, subd. (c)(2)(A)). At sentencing, the trial court struck one of defendant's prior serious felony convictions and sentenced him to serve three years in state prison on each count, served concurrently, and doubled to six years under the three strikes law.

In this appeal, defendant contends, first, that the trial court abused its discretion when it found defendant had not established good cause to support his *Pitchess*¹ motion. Next, defendant contends the trial court abused its discretion by allowing the prosecutor to impeach defendant's credibility with evidence that defendant previously had been convicted of burglary and robbery. Defendant's third claim of error is that the trial court's order directing him to pay \$1,000 to reimburse the County of Riverside for attorney's fees is not supported by evidence of defendant's ability to pay. As his fourth claim, defendant contends the trial court violated Penal Code section 654 because it did

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

not stay execution of the sentence imposed on one of his convictions. Defendant also contends, and the Attorney General concedes, that the trial court did not correctly calculate defendant's presentence custody credit. As his final claim, defendant joins in the argument raised in an earlier appeal filed by his codefendant Samantha Brown (case No. E051378) that the trial court erred when it concluded it lacked jurisdiction to reconsider defendant's motion to suppress evidence under Penal Code section 1538.5.

We agree with several of defendant's claims. In particular, we agree with his first and final claims of error and, therefore, will conditionally reverse the judgment with directions to the trial court to conduct the in camera review of the personnel records in question and to reconsider defendant's motion to suppress evidence. We also agree with defendant's third claim of error, and will direct the trial court to either conduct a hearing to determine defendant's financial ability to reimburse the county for the cost of the public defender or to strike the reimbursement order. Finally, we will direct the trial court to amend the abstract of judgment to correctly reflect defendant's presentence custody credit.

FACTS

Resolution of the issues defendant raises in this appeal does not depend on the circumstances of the underlying crimes. Therefore, it is sufficient to note that on January 30, 2008, Riverside County Deputy Sheriff James Keener arrested defendant outside the mobilehome where he lived with codefendant, Samantha Brown, after the deputy found a digital scale and a plastic container of what appeared to be methamphetamine on the

ground beneath a partially open window of the mobilehome. In a subsequent search of the residence, which was a 10 by 20 single room with a small bathroom, Deputy Keener found a bindle of methamphetamine in a dresser drawer, along with \$370 in cash, a single beam scale, two baggies of marijuana, and \$90 in cash on a desk.

Defendant and codefendant Brown moved to suppress the evidence recovered in the search of the mobilehome, but the trial court denied that motion. Codefendant Brown then pled guilty to both counts. In her appeal (case No. E051378), we conditionally reversed the judgment and remanded the matter to the trial court to conduct a new hearing on the motion to suppress.

At trial, defendant claimed that the methamphetamine in the plastic container belonged to Catherine Campbell who was standing outside with defendant when the sheriff's deputies arrived. According to defendant, who testified in his own defense, when she saw the deputies driving toward defendant's residence, which apparently is located down a long dirt road, Campbell tossed the plastic container. Brown also testified at defendant's trial. Among other things, she stated she had purchased methamphetamine from Campbell a few minutes before the sheriff's deputies arrived.

DISCUSSION

1.

DENIAL OF DEFENDANT'S *PITCHESS* MOTION

Defendant contends the trial court erred when it found he had not established good cause and therefore denied his *Pitchess* motion without conducting an in camera review of Deputy Keener's personnel records. We agree.

A. Pertinent Facts

Before trial, defendant filed a motion under Evidence Code section 1043 seeking discovery of information in the personnel file of Riverside County Sheriff's Deputy James Keener, the deputy who found the plastic container with the methamphetamine. In that motion, defendant sought disclosure of "any documents discussing, mentioning, pertaining or relating to reports, complaints, or investigations of: [¶] a. Dishonesty, falsifying police reports, and false testimony; [¶] b. Tampering with Evidence [*sic*]." Defendant's attorney asserted in his supporting affidavit that Deputy Keener falsely stated in his report of the incident that he found the plastic container with the methamphetamine on the ground outside a partially open window of the residence. However, at defendant's preliminary hearing, Deputy Keener had testified that "[a] dog brought the Tupperware contained [*sic*] to his attention," "[a]fter he found the Tupperware and as he was getting his digital camera the dog brought the Tupperware container to him," and after he took the "container from the dog he placed it back behind the trailer." Defendant denied that the Tupperware container was found behind his

residence and asserted that Deputy Keener only became aware of the container because defendant's dog brought it to him.

In an amended declaration, defendant's attorney asserted in pertinent part that defendant claimed Catherine Campbell threw the plastic container of methamphetamine when she saw the officers approaching the residence; the first time the officers saw the plastic container was when the dog brought it to them. Defendant's attorney also asserted that Deputy Keener had not been truthful when he testified at a hearing on defendant's motion to suppress evidence that he knew codefendant Brown was on probation at the time he searched the trailer. The prosecutor later admitted, at a hearing on defendant's motion to reconsider the motion to suppress, that Deputy Keener had not checked CLETS (California Law Enforcement Telecommunications System) to obtain Brown's address until two weeks after the search.

The trial court summarily denied defendant's *Pitchess* motion following a hearing at which defendant argued he had made the necessary showing to require the trial court to conduct an in camera review of Deputy Keener's personnel file.

B. Analysis

“‘[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both “‘materiality’ to the subject matter of the pending litigation and a ‘reasonable belief’ that the agency has the type of information sought.”

[Citation.] A showing of good cause is measured by “relatively relaxed standards” that serve to “insure the production” for trial court review of “all potentially relevant documents.” [Citation.]’ [Citation.]” (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1339-1340 [Fourth Dist., Div. Two] (*Sanderson*), quoting *People v. Gaines* (2009) 46 Cal.4th 172, 179.) “The defendant does not need to corroborate or show motivation for the alleged officer misconduct, but must provide “a plausible scenario . . . that might or could have occurred.” [Citation.] A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. [Citation.]’ [Citation.]” (*Sanderson*, at p. 1340, quoting *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.)

“[D]efendant need demonstrate only “a logical link between the *defense* proposed and the pending charge” and describe with some specificity “how the discovery being sought would support such a defense or how it would impeach the officer’s version of events” [citation].’ [Citation.]” (*Sanderson, supra*, 181 Cal.App.4th at p. 1340, quoting *People v. Gaines, supra*, 46 Cal.4th at p. 182.) “The inquiry does not involve ‘an assessment or weighing of the persuasive value of the evidence . . . presented [or] which should have been presented. [Citations.] Indeed, a defendant is entitled to discover relevant information under *Pitchess* even in the absence of any judicial determination that the potential defense is credible or persuasive.’ [Citation.]” (*Sanderson*, at p. 1340.) “If the defendant establishes good cause, the court must review the requested records in

camera to determine what information, if any, should be disclosed. [Citation.]’

[Citation.]” (*Ibid.*)

As recounted above, defendant’s showing in support of his *Pitchess* motion was that Deputy Keener was not truthful when he stated in his report that he found the plastic container with the methamphetamine on the ground outside a partially open window of the residence. According to defendant, the deputy recovered the plastic container with the methamphetamine from defendant’s dog, and the dog had retrieved the container from some unspecified part of the property after Catherine Campbell, who had been standing outside with defendant, tossed the container when she saw the sheriffs’ vehicles approaching. In short, the defense was that Campbell possessed the methamphetamine, not defendant, and Deputy Keener put the plastic container near the digital scale after he recovered it from the dog so that he could take photographs that would support his false claim that the methamphetamine had been tossed out the residence window (presumably by codefendant Brown, whom Deputy Keener testified had been standing at the door but turned and went inside the residence when the deputy made eye contact with her).

The Attorney General contends defendant’s showing did not establish good cause because defendant did not account for all the other evidence, including the digital scale, Deputy Keener listed in his report. In other words, the Attorney General argues defendant did not establish a plausible factual scenario because the scenario was unlikely in light of the other evidence the deputy recovered. Defendant is not required to “present a factual scenario that is reasonably likely to have occurred or is persuasive or even

credible. [Citation.]” (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1318, citing *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025-1026.)

“[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1026.) “To determine whether the defendant has established good cause for in-chambers review of an officer’s personnel records, the trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel’s affidavit in support of the *Pitchess* motion adequately responds to these questions, and states ‘upon reasonable belief that the governmental agency identified has the records or information from the records’ (§ 1043, subd. (b)(3)), then the defendant has shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant.” (*Id.* at pp. 1026-1027.)

Defendant made the required showing in this case. The trial court should have conducted the in camera review of Deputy Keener's personnel file to determine whether it contained reports, complaints, or investigations of the deputy for dishonesty, falsifying police reports, giving false testimony and/or tampering with evidence, as defendant requested. The remedy here "is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*People v. Gaines, supra*, 46 Cal.4th at p. 180.) "After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information." (*Id.* at p. 181.) If so, the trial court shall reinstate the judgment. (*Ibid.*) Even if the in camera review reveals relevant information, reversal is not necessarily required. The defendant "must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*Id.* at p. 182.) If defendant does demonstrate such a probability, the court must order a new trial; if he does not, the judgment shall be reinstated. (*People v. Gaines, supra*, at pp. 181-182.)

2.

IMPEACHMENT EVIDENCE

Defendant contends the trial court abused its discretion by allowing the prosecutor to impeach defendant's credibility with evidence that he had previously been convicted of robbery and burglary. We disagree.

A. Pertinent Facts

Before trial, defendant moved to limit the prior convictions the prosecution could use to impeach his credibility if defendant decided to testify. The trial court ruled that it would limit the prosecution to defendant's 1991 conviction for burglary and his 1992 robbery conviction. Defendant did testify at trial and the prosecutor used the noted criminal convictions to impeach his credibility.

B. Analysis

Defendant contends the trial court's ruling was a prejudicial abuse of discretion because the probative value of the criminal convictions was substantially outweighed by their potential for prejudice. Defendant concedes his attorney did not assert an Evidence Code section 352 objection in the trial court.² Therefore, defendant also asserts, as an alternate claim, that he was denied his Sixth Amendment right to the effective assistance of counsel.

Because he did not assert the Evidence Code section 352 objection in the trial court, defendant has forfeited the issue for review on appeal. (*People v. Williams* (2008) 43 Cal.4th 584, 620; Evid. Code, § 353.) Consequently, we will only address defendant's assertion in the context of his ineffective assistance of counsel claim.

² Defendant's attorney did object based on the fact that defendant's convictions were more than 10 years old and under the federal system, prior convictions "wash out after ten years." The trial court did not expressly rule on the objection, but instead adhered to its indicated ruling that the prosecution could use the burglary and robbery convictions for impeachment purposes.

To establish a claim of ineffective assistance of counsel, defendant must “demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541, citing, among other cases, *Strickland v. Washington* (1984) 466 U.S. 668.) In evaluating counsel’s actions at trial, “A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. [Citation.]” (*People v. Dennis, supra*, at p. 541.)

Trial counsel’s performance in this case was not deficient. In *People v. Wheeler* (1992) 4 Cal.4th 284, the court held, under article I, section 28, subdivision (d) of the California Constitution, that any felony and any misdemeanor involving moral turpitude could be used for impeachment, subject to the trial court’s discretion. (*People v. Wheeler, supra*, at p. 296.) Defendant does not dispute that his robbery and burglary convictions are admissible for impeachment purposes. Instead, he contends only that his trial attorney should have objected under Evidence Code section 352 that the probative value of those convictions is substantially outweighed by their potential for undue

prejudice. Defendant does not demonstrate specific prejudice. Instead, he argues only generically that evidence of uncharged crimes is inherently prejudicial and therefore neither prior conviction should have been admitted at trial. In other words, defendant is of the view that if his trial attorney had objected the trial court would have exercised its discretion to exclude all of defendant's prior convictions with the result that the prosecution would have been precluded from impeaching defendant's credibility with that evidence if he testified at trial. That result is very unlikely, which most likely explains why trial counsel did not assert the Evidence Code section 352 objection.

In short, we conclude trial counsel acted with reasonable competence in moving to limit the number and type of prior convictions the prosecution would be permitted to use to impeach defendant's credibility if he decided to testify at trial. The trial court, in turn, did not abuse its discretion by ruling that the prosecution would be permitted to use defendant's prior robbery and prior burglary convictions, even over defense counsel's objection that the convictions were more than 10 years old.

Finally, to the extent defendant contends trial counsel should have objected that use of more than one prior conviction was unduly prejudicial, we must also reject that claim. Defendant argues that use of more than one prior conviction necessarily inflamed the jury's passion and blinded them to the theory of the defense. We do not share defendant's view. The defense theory was that unbeknownst to defendant, his then girlfriend Samantha Brown was using methamphetamine and Catherine Campbell brought the drugs to defendant's house to sell to Brown on the date in question. When

the sheriff's deputies arrived, Campbell tossed the container with the methamphetamine. Defendant's dog retrieved the plastic container, which Deputy Keener recovered and then placed under the partially open window to make it look as if it had been tossed out from the house. That theory depended almost entirely on the testimony of Samantha Brown, rather than on defendant's testimony. Consequently, even if trial counsel had objected to the use of more than one felony conviction to impeach defendant, defendant has not demonstrated it is reasonably probable the jury would have reached results more favorable to him on either count.

For each of the reasons discussed, we must reject defendant's claim that his two prior felony convictions should not have been admitted into evidence at trial.

3.

SENTENCING ISSUES

Defendant raises various claims regarding sentencing, the first of which is that the trial court's order that he pay \$1,000 as attorney's fees to reimburse the county for the cost of the public defender is improper because defendant did not have notice and the trial court did not find defendant had the present ability to pay those fees. We agree.

A. Attorney's Fees Order

(1.) *Pertinent Facts*

At sentencing, the trial court found defendant ineligible for probation based on his criminal record, and sentenced him to serve six years in state prison on each count, the sentences to run concurrently to each other. At the conclusion of the sentencing hearing,

the prosecutor told the trial court that “it is common in this county that the defendant be ordered to reimburse for the services of the Public Defender’s service [*sic*].” After the trial court asked what the reimbursement rate is³ and defendant’s attorney objected to such an order because defendant had been declared indigent at the beginning of this matter, the trial court noted that such orders cannot be enforced “unless the defendant has a financial ability to make the payments.” The trial court added, “I pretty much will guarantee while he’s in the Department of Corrections, he’s not going to have the money to pay the fees, so they will not be assessable against him. If he’s released on parole and maintains employment, then he may have to repay all or a portion of the ordered attorney fees. If somebody wants to hold it on their books until he gets out, that is fine. We’ll address it at that point.” The trial court then “assess[ed] an amount of \$1,000 for attorney fees” which the trial court made “collectable only dependent upon the defendant’s financial ability to do so.”

(2.) *Analysis*

Defendant challenges the trial court’s purported attorney’s fees order on the grounds, first, that he did not have notice and, second, that the trial court did not make a finding of defendant’s ability to pay. The probation report did not include a recommendation that defendant reimburse the county for the cost of the public defender. There is no other indication in the record that defendant received notice that he might be

³ The prosecutor was unsure but believed the rate is \$80 to \$100 a day.

required to reimburse the county for the cost of the public defender. The Attorney General contends defendant has forfeited the notice issue because he did not raise that objection in the trial court. Assuming without actually deciding that the Attorney General is correct, we nevertheless may address the validity of the trial court's purported order directing defendant to pay attorney's fees. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [a challenge to sufficiency of the evidence is forfeited only by failure to file a timely appeal].)

“[Penal Code] section 987.8, establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant.

[Citation.] Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has ‘the present ability . . . to pay all or a portion’ of the defense costs.

[Citations.] If this finding is made, ‘the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.’ [Citation.]” (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1205, fn. omitted.)

“‘Ability to pay’ means ‘the overall capability’ of the defendant to reimburse all or a portion of the defense costs. ([Pen. Code,] § 987.8, subd. (g)(2).) It requires consideration of the defendant’s financial position at the time of the hearing, his or her ‘reasonably discernible’ financial position over the subsequent six months, including the likelihood of employment during that time, and ‘[a]ny other factor or factors which may

bear upon the defendant's financial capability to reimburse the county.' ([Pen. Code,] § 987.8, subd. (g)(2)(A)–(D).)" (*People v. Polk*, *supra*, 190 Cal.App.4th at p. 1205, fn. omitted.) "The statute anticipates that a defendant's financial position will be determined at the time of sentencing." (*Ibid.*, fn. 24, citing *People v. Phillips* (1994) 25 Cal.App.4th 62, 73.)

A determination that the defendant is financially able to pay attorney's fees is a prerequisite under Penal Code section 987.8 to an order requiring the defendant to reimburse the county for the cost of appointed counsel. (Cf. *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 ["this statute ordinarily may not require an express finding of ability to pay"].)⁴ The trial court did not make the required determination in this case, and in fact expressly deferred that determination to a future date. As a result, the trial court's order directing defendant to pay \$1,000 in attorney's fees is invalid because it is not supported by any evidence that defendant was at the time or would be in the future in a financial position to pay the sum imposed. Consequently, we will vacate that order and remand the matter to the trial court with directions to conduct a hearing to determine

⁴ We not only disagree with the suggestion that an express finding of ability to pay is not required, we also disagree with the statement in *People v. Lopez*, *supra*, that the statute "contains a presumption that those sentenced to prison are unable to pay." (*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1537.) Penal Code section 987.8, subdivision (g)(2)(B), which the *Lopez* court cites to support the purported presumption, states, "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible *future* financial ability to reimburse the costs of his or her defense." (*Ibid.*, emphasis added.) The statute expressly pertains to an incarcerated defendant's future ability to pay the costs of defense and does not create a presumption regarding a defendant's present ability to pay.

whether defendant now has or will have in the future the financial ability to pay the \$1,000 fee order.

B. Penal Code Section 654

Defendant next contends that the trial court violated Penal Code section 654 when it did not stay execution of the sentence imposed on count 2, defendant's conviction for violating Health and Safety Code section 11366 by maintaining a place among other things for the sale of methamphetamine. We disagree.

Penal Code section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute prohibits multiple punishments for multiple offenses that arise from a single act or from a series of acts that constitute an indivisible course of criminal conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 18.) Whether Penal Code section 654 applies is a question of fact for the trial court to resolve, and we must affirm the trial court's express or implied factual findings if they are supported by substantial evidence. (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

In *People v. Moseley*, *supra*, the Fifth District concluded substantial evidence supported the trial court's finding that the defendant harbored separate intents in possessing methamphetamine for sale (Health & Saf. Code, § 11378) and in opening or

maintaining a place for selling, giving away or using a controlled substance (Health & Saf. Code, § 11366). In that court’s view, possession of the drugs in a quantity sufficient to sell is akin to the inventory maintained by a retail store. The owner’s intent or objective in possessing the inventory is to sell it. “The owner’s objective in maintaining the store, however, is different from and independent of this intent.” The intent in maintaining a place for selling methamphetamine is to provide a place to sell inventory on an ongoing basis, and exists apart from whether the current inventory is sold. (*People v. Moseley, supra*, 164 Cal.App.4th at p. 1604.)

The evidence in this case supports the trial court’s finding that defendant committed separate crimes and therefore Penal Code section 654 did not prohibit separate sentences. Not only did defendant maintain a place at which to sell methamphetamine, there was also evidence that showed defendant maintained his residence as a place where people also used methamphetamine. In particular, Catherine Campbell testified she regularly smoked methamphetamine with defendant at his residence, and that she had also seen other people doing so. Therefore, we must conclude the trial court’s finding that the crimes “are separate violations” that are not “subject to [Penal Code section] 654 treatment” is supported by substantial evidence.

C. Presentence Custody Credit

Defendant contends, and the Attorney General concedes, the trial court incorrectly calculated defendant’s presentence custody credit; instead of 139 days, defendant is

entitled to 223 days of credit. The Attorney General's concession is appropriate.

Therefore, we will direct the trial court to amend the judgment, accordingly.

4.

MOTION TO SUPPRESS EVIDENCE

Defendant joins in the argument raised by codefendant Brown in her appeal in case No. E051378 that the trial court erroneously concluded it lacked jurisdiction to reconsider his motion to suppress evidence recovered in the warrantless search of his property and home. The Attorney General acknowledges joinder is broadly permitted under rule 8.200(a)(5) of the California Rules of Court, but contends defendant first must "particularize Brown's claim" to show that it also applies to him, and in any event defendant must demonstrate prejudice as well as error.

We disagree with the Attorney General's initial assertion that defendant must demonstrate that Brown's claim of error also applies to him. Defendant's claim is based on the same facts codefendant Brown relied on in her appeal. The Attorney General does not cite any facts that apply only to defendant and were not included in codefendant Brown's appeal. Codefendant Brown's argument with regard to the suppression motion applies equally to defendant.

We concluded in codefendant Brown's appeal that the trial court erroneously found it lacked jurisdiction to reconsider its ruling on defendant's motion to suppress

evidence.⁵ Because codefendant Brown pled guilty to both counts after the trial court denied her motion to reconsider, we conditionally reversed the judgment and remanded to the trial court for a new hearing on the suppression issue. (See case No. E051378.) We directed the trial court to reinstate the judgment if on remand it again denied the suppression motion.⁶

Our resolution of the procedural issue in codefendant Brown’s appeal, which raised only a question of law, is law of the case. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 524 [““The law of the case doctrine holds that when an appellate opinion states a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to through its subsequent progress in the lower court and upon subsequent appeal. [Citations.]””].) Therefore, we conclude here as we did in case No. E051378 that defendant did not have a full and fair opportunity to address the merits of his motion to suppress evidence, and as a result, the trial court erroneously denied defendant’s motion to reconsider its ruling on that motion.

Whether that ruling requires reversal of the judgment in this case depends on defendant’s ability to show prejudice. Defendant does not address prejudice. We agree with the Attorney General that prejudice is an issue that requires particularized analysis because defendant and codefendant Brown are not similarly situated. The Attorney

⁵ Defendant actually was the one who filed the motion to suppress evidence in the trial court, and codefendant Brown joined in that motion.

⁶ If the trial court has conducted the hearing on the suppression motion, the parties have not noted that fact in their respective briefs.

General contends the error was not prejudicial to defendant because even if the trial court had reconsidered and granted defendant's motion, the only evidence that would have been suppressed is that recovered from inside defendant's residence. In the Attorney General's view, any error resulting from failure to suppress that evidence was harmless beyond a reasonable doubt. We do not agree.

The Attorney General, in addressing prejudice, points out that in addition to the plastic container and digital scale Deputy Keener located outside defendant's residence, other witnesses testified at trial that they not only bought drugs from defendant but also saw other people doing so. In particular, Catherine Campbell testified that defendant sold methamphetamine, and several times a week she smoked methamphetamine with defendant at his home. She was also present when other people would come to defendant's house to buy and/or smoke methamphetamine with defendant. Two neighbors also testified that automobile traffic was heavy on Haddock Street while defendant lived there, but after defendant moved the heavy traffic stopped.

The defense in this case, as previously noted, was that the methamphetamine in the plastic container belonged to Catherine Campbell. In view of that defense, we cannot say we have no reasonable doubt the jury would have reached the same results in this case if they had not also heard Deputy Keener's testimony about the items he recovered from inside the residence. Those items consisted of a bindle of methamphetamine and \$370 in cash found in a dresser drawer; \$90 found on a nearby desk; four cell phones; two sandwich baggies that contained marijuana; and a single beam scale, which

according to the deputy is a type typically used to weigh narcotics. Absent the physical evidence recovered inside the residence, defendant's guilt depends on the credibility of the prosecution's various witnesses, particularly that of Catherine Campbell.

Because we are conditionally reversing the judgment so the trial court can conduct the in camera review required by *Pitchess*, we will also direct the trial court to reconsider defendant's motion to suppress evidence. If the trial court grants this motion and suppresses the evidence, then it shall grant defendant a new trial.

DISPOSITION

The judgment is modified to include 223 days of pretrial custody credit, rather than 139 days. As modified the judgment is conditionally reversed and remanded to the trial court with directions, first, to reconsider the merits of defendant's motion to suppress evidence. If the trial court grants that motion, and suppresses the challenged evidence, it shall grant defendant a new trial. Next, the trial court is directed to conduct an in camera review of Deputy Keener's sheriff's department personnel file to determine whether the file contains any evidence of the type defendant specified in his *Pitchess* motion. If the trial court identifies evidence of the type defendant identified, and the trial court has also granted defendant's suppression motion and ordered a new trial, then the trial court is directed to disclose the evidence to defendant. If the trial court did not grant defendant's motion to suppress and order a new trial, the trial court is directed to determine whether failure to disclose the pertinent evidence in Deputy Keener's personnel file was prejudicial to defendant, and if so, to order a new trial. If the trial court denies the motion

to suppress, and also finds that Deputy Keener's personnel file either does not contain any relevant material, or that it does contain relevant material but that failure to disclose it was not prejudicial, then the trial court is directed to either conduct a hearing to determine defendant's financial ability to reimburse the county for the cost of the public defender or to strike that order and modify the judgment accordingly. The judgment as modified shall then be reinstated with directions to the trial court to prepare an amended abstract of judgment that correctly reflects defendant's presentence custody credit as 223 days, and to forward copies of the amended abstract of judgment to the appropriate governmental agencies.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

RAMIREZ
P.J.
MILLER
J.